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VERIO INC. &
NTT AMERICA, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

SILICON VALLEY TELECOM EXCHANGE,
LLC, a California corporation,

Plaintiffs,

v.

VERIO, INC., a Delaware corporation; NTT
AMERICA, INC., a Delaware corporation; and
DOES 1 through 25,

Defendants.

Case No. CV-12-00899-HRL-ADR

**DEFENDANTS VERIO INC. AND NTT
AMERICA, INC.'S ANSWER TO
VERIFIED COMPLAINT FOR BREACH
OF CONTRACT**

DEMAND FOR JURY TRIAL

Judge: Hon. Howard R. Lloyd

Date Action Filed: Jan. 6, 2012

Verio Inc. ("Verio") and NTT America, Inc. ("NTTA") respond to Plaintiff Silicon Valley
Telecom Exchange, LLC's ("SVTX") Verified Complaint for Breach of Contract as follows:

1. Verio and NTTA admit that Verio is a corporation organized under Delaware law.
Except as expressly admitted, Verio and NTTA deny each and every allegation contained in
paragraph 1.

2. Verio and NTTA admit that NTTA is a corporation organized under Delaware law.
Except as expressly admitted, Verio and NTTA deny each and every allegation contained in
paragraph 2.

ANSWER TO VERIFIED COMPLAINT FOR BREACH OF CONTRACT
Case No. CV 12-00899-HRL-ADR
PA-1512932

1 3. Verio and NTTA are without sufficient information or belief to answer the
2 allegations contained in paragraph 3 of the Verified Complaint, and, on such grounds, deny each
3 and every allegation contained in the paragraph.

4 4. Verio and NTTA are without sufficient information or belief to answer the
5 allegations contained in paragraph 4 of the Verified Complaint, and, on such grounds, deny each
6 and every allegation contained in the paragraph.

7 5. Verio and NTTA are without sufficient information or belief to answer the
8 allegations contained in paragraph 5 of the Verified Complaint, and, on such grounds, deny each
9 and every allegation contained in the paragraph.

10 6. Verio and NTTA are without sufficient information or belief to answer the
11 allegations contained in paragraph 6 of the Verified Complaint, and, on such grounds, deny each
12 and every allegation contained in the paragraph.

13 7. Verio and NTTA are without sufficient information or belief to answer the
14 allegations contained in paragraph 7 of the Verified Complaint, and, on such grounds, deny each
15 and every allegation contained in the paragraph.

16 8. Verio and NTTA are without sufficient information or belief to answer the
17 allegations contained in paragraph 8 of the Verified Complaint, and, on such grounds, deny each
18 and every allegation contained in the paragraph.

19 9. Verio and NTTA admit that Verio signed a written sublease agreement with
20 Plaintiff SVTX in May 1999. Except as expressly admitted, Verio and NTTA deny each and
21 every allegation contained in paragraph 9.

22 10. Verio and NTTA deny each and every allegation contained in paragraph 10 of the
23 Verified Complaint.

24 11. Verio and NTTA deny each and every allegation contained in paragraph 11 of the
25 Verified Complaint.

26 12. Verio and NTTA deny each and every allegation contained in paragraph 12 of the
27 Verified Complaint.

1 13. Verio and NTTA deny each and every allegation contained in paragraph 13 of the
2 Verified Complaint.

3 14. Verio and NTTA deny each and every allegation contained in paragraph 14 of the
4 Verified Complaint.

5 15. Verio and NTTA deny each and every allegation contained in paragraph 15 of the
6 Verified Complaint.

7 16. Verio and NTTA deny each and every allegation contained in paragraph 16 of the
8 Verified Complaint.

9 17. Verio and NTTA deny each and every allegation contained in paragraph 17 of the
10 Verified Complaint.

11 18. Verio and NTTA deny each and every allegation contained in paragraph 18 of the
12 Verified Complaint.

13 19. Verio and NTTA admit that NTTA signed a written sublease agreement with
14 Plaintiff SVTX in or around May of 1999. Except as expressly admitted, Verio and NTTA deny
15 each and every allegation contained in paragraph 19.

16 20. Verio and NTTA deny each and every allegation contained in paragraph 20 of the
17 Verified Complaint.

18 21. Verio and NTTA deny each and every allegation contained in paragraph 21 of the
19 Verified Complaint.

20 22. Verio and NTTA deny each and every allegation contained in paragraph 22 of the
21 Verified Complaint.

22 23. Verio and NTTA deny each and every allegation contained in paragraph 23 of the
23 Verified Complaint.

24 24. Verio and NTTA deny each and every allegation contained in paragraph 24 of the
25 Verified Complaint.

26 25. Verio and NTTA deny each and every allegation contained in paragraph 25 of the
27 Verified Complaint.

1 26. Verio and NTTA admit they constructed improvements at the property located at
2 250 Stockton Avenue in San Jose, California. Except as expressly admitted, Verio and NTTA
3 deny the allegations contained in paragraph 26.

4 27. Verio and NTTA deny each and every allegation contained in paragraph 27 of the
5 Verified Complaint.

6 28. Verio and NTTA deny each and every allegation contained in paragraph 28 of the
7 Verified Complaint.

8 29. Verio and NTTA deny each and every allegation contained in paragraph 29 of the
9 Verified Complaint.

10 30. Verio and NTTA contracted with CBI Technology Group ("CBI"). Except as
11 expressly admitted, Verio and NTTA deny the allegations contained in paragraph 30.

12 31. Verio and NTTA deny each and every allegation contained in paragraph 31 of the
13 Verified Complaint.

14 32. Verio and NTTA admit that on May 19, 2010, their representatives and
15 representatives for SVTX walked through the property located at 250 Stockton Avenue in San
16 Jose, California. Except as expressly admitted, Verio and NTTA deny the allegations in
17 paragraph 32.

18 33. Verio and NTTA deny each and every allegation contained in paragraph 33 of the
19 Verified Complaint.

20 34. Verio and NTTA deny each and every allegation contained in paragraph 34 of the
21 Verified Complaint.

22 35. Verio and NTTA deny denies each and every allegation contained in paragraph 35
23 of the Verified Complaint.

24 36. Verio and NTTA deny denies each and every allegation contained in paragraph 36
25 of the Verified Complaint.

26 37. Verio and NTTA deny the allegations contained in paragraph 37 of the Verified
27 Complaint.

1 38. Verio and NTTA deny the allegations contained in paragraph 38 of the Verified
2 Complaint.

3 39. Verio and NTTA deny the allegations contained in paragraph 39 of the Verified
4 Complaint.

5 40. Verio and NTTA deny each and every allegation contained in paragraph 40 of the
6 Verified Complaint.

7 41. Verio and NTTA deny each and every allegation contained in paragraph 41 of the
8 Verified Complaint.

9 42. Verio and NTTA are without sufficient information or belief to answer the
10 allegations contained in paragraph 42 of the Verified Complaint, and, on such grounds, deny each
11 and every allegation contained in the paragraph.

12 **FIRST CAUSE OF ACTION FOR BREACH OF CONTRACT**

13 **(As to Verio)**

14 43. Verio incorporates by reference, realleges, and reasserts, as though set forth in full,
15 paragraphs 1-42 inclusive, as set forth above. Having not been named in the first cause of action,
16 NTTA makes no answer to the allegations found in paragraphs 43 through 54 of the Verified
17 Complaint.

18 44. Verio denies each and every allegation contained in paragraph 44 of the Verified
19 Complaint.

20 45. Verio denies each and every allegation contained in paragraph 45 of the Verified
21 Complaint.

22 46. Verio denies each and every allegation contained in paragraph 46 of the Verified
23 Complaint.

24 47. Verio denies each and every allegation contained in paragraph 47 of the Verified
25 Complaint.

26 48. Verio denies each and every allegation contained in paragraph 48 of the Verified
27 Complaint.

49. Verio denies each and every allegation contained in paragraph 49 of the Verified Complaint.

50. Verio denies each and every allegation contained in paragraph 50 of the Verified Complaint.

51. Verio denies each and every allegation contained in paragraph 51 of the Verified Complaint.

52. Verio denies each and every allegation contained in paragraph 52 of the Verified Complaint.

53. Verio denies each and every allegation contained in paragraph 53 of the Verified Complaint.

54. Verio denies each and every allegation contained in paragraph 54 of the Verified Complaint.

SECOND CAUSE OF ACTION FOR BREACH OF CONTRACT

(As to NTTA)

55. NTTA incorporates by reference, realleges, and reasserts, as though set forth in full, paragraphs 1-42 inclusive, as set forth above. Having not been named in the second cause of action, Verio makes no answer to the allegations found in paragraphs 55 through 64 of the Verified Complaint.

56. NTTA denies each and every allegation contained in paragraph 56 of the Verified Complaint.

57. NTTA denies each and every allegation contained in paragraph 57 of the Verified Complaint.

58. NTTA denies each and every allegation contained in paragraph 58 of the Verified Complaint.

59. NTTA denies each and every allegation contained in paragraph 59 of the Verified Complaint.

60. NTTA denies each and every allegation contained in paragraph 60 of the Verified Complaint.

1 61. NTTA denies each and every allegation contained in paragraph 61 of the Verified
2 Complaint.

3 62. NTTA denies each and every allegation contained in paragraph 62 of the Verified
4 Complaint.

5 63. NTTA denies each and every allegation contained in paragraph 63 of the Verified
6 Complaint.

7 64. NTTA denies each and every allegation contained in paragraph 64 of the Verified
8 Complaint.

9 **RELIEF REQUESTED BY SVTX**

10 65. Verio and NTTA deny that SVTX is entitled to any of the relief requested in the
11 Verified Complaint.

12 **AFFIRMATIVE DEFENSES**

13 66. Each of the affirmative defenses alleged is asserted as to each purported Cause of
14 Action in the First Amended Complaint. By alleging the defenses set forth below, Verio and
15 NTTA are in no way agreeing or conceding that they have the burden of proof or the burden of
16 persuasion on any of the issues raised by the defenses.

17 **FIRST AFFIRMATIVE DEFENSE**

18 67. As a first affirmative defense to the Verified Complaint, Verio and NTTA allege
19 that the Verified Complaint and each claim alleged fail to state facts sufficient to constitute a
20 claim against either Verio or NTTA.

21 **SECOND AFFIRMATIVE DEFENSE**

22 68. As a second affirmative defense to the Verified Complaint, Verio and NTTA
23 allege that all of SVTX's allegations are barred by applicable statutes of limitations.

24 **THIRD AFFIRMATIVE DEFENSE**

25 69. As a third affirmative defense to the Verified Complaint, Verio and NTTA allege
26 that SVTX's claims are barred, in whole or in part, by the doctrine of unclean hands. Among
27 other things, SVTX has unclean hands: (a) with respect to its allegations that Verio and NTTA
28 breached the sublease agreement because SVTX itself breached the sublease agreement by

1 violating the sublease's terms and/or seeking to impose terms beyond those agreed to by the
2 parties; and (b) with respect to its allegations that Verio and NTTA failed to adequately clean or
3 remediate diesel fuel contamination on the property because SVTX intentionally and willfully
4 frustrated Verio and NTTA's efforts to clean or remediate the property.

5 **FOURTH AFFIRMATIVE DEFENSE**

6 70. As a fourth affirmative defense to the Verified Complaint, Verio and NTTA allege
7 that SVTX has waived any claim it might have against Verio and NTTA by its own acts, conduct,
8 omission, or otherwise and therefore is precluded from maintaining this action and from obtaining
9 judgment against either Verio or NTTA. SVTX systematically frustrated Verio and NTTA's
10 efforts to comply with the terms of the parties' sublease agreement by interfering with Verio's
11 subcontractor's authorized activities, unreasonably withholding its consent to otherwise
12 authorized tenant activities, breaching the sublease agreement, withholding access to the property,
13 and issuing improper invoices.

14 **FIFTH AFFIRMATIVE DEFENSE**

15 71. As a fifth affirmative defense, Verio and NTTA allege that SVTX failed to
16 exercise reasonable care and diligence to mitigate its damages, if there were any. Verio
17 surrendered possession of the property at 250 Stockton Ave. on or before June 30, 2010. NTTA
18 surrendered possession of the property at 250 Stockton Ave. on or before June 1, 2010. Since
19 Defendants' surrender of the property, SVTX has made inadequate attempts to re-let the
20 premises. Rather than focus on obtaining a new tenant, SVTX has instead sought to hold Verio
21 and NTTA responsible for insuring SVTX against a market-wide decline in commercial real
22 estate. Because the property at 250 Stockton is vacant, suitable, and ready for commercial use,
23 the source of SVTX's claimed injury is its inadequate efforts to secure a tenant for the property at
24 250 Stockton Avenue, not Verio or NTTA's conduct.

25 **SIXTH AFFIRMATIVE DEFENSE**

26 72. As a sixth affirmative defense, Verio and NTTA allege that SVTX's claims are
27 barred by the doctrine of estoppel. SVTX was aware that a small patch of soil on the property
28 located at 250 Stockton Avenue may have been contaminated with diesel fuel on or before

1 May 19, 2010. Knowing this, SVTX accepted Verio and NTTA's surrender of the property.
2 Relying on SVTX's acceptance of their surrender, and ignorant of SVTX's intention, Verio and
3 NTTA agreed to undertake certain remediation of the property located at 250 Stockton Avenue
4 after having vacated the property. SVTX then improperly claimed that Verio and NTTA retained
5 possession and control of the property, even though they had both surrendered the property.

6 ***

7 Verio and NTTA reserve all affirmative defenses under Rule 8(c) of the Federal Rules of
8 Civil Procedure, and any other defenses, at law or in equity, that may be available now or may
9 become available in the future based on discovery or any other factual investigation in the case.

10 WHEREFORE, Verio and NTTA pray for judgment against SVTX as follows:

- 11 1. that SVTX take nothing by its Verified Complaint;
- 12 2. that Verio and NTTA be awarded their costs, expenses, and reasonable attorney's
13 fees; and
- 14 3. that Verio and NTTA be awarded such other relief as the Court deems just and
15 proper.

16 Dated: March 1, 2012

BRYAN WILSON
PETER H. DAY
MORRISON & FOERSTER LLP

19 By: /s/ Bryan Wilson
20 BRYAN WILSON

21 Attorneys for Defendants
22 VERIO, INC. &
23 NTT AMERICA, INC.

DEMAND FOR JURY TRIAL

Pursuant to Federal Rule of Civil Procedure 38(b) and Local Rule 3-6, Defendants Verio, Inc. and NTT America, Inc. hereby demand a trial by jury in this action.

Dated: March 1, 2012

BRYAN WILSON
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By: /s/ Bryan Wilson
BRYAN WILSON

Attorneys for Defendants
VERIO, INC. &
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